UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

EDWARD C. FREEMAN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-120-B***
	)	
KENNETH S. APFEL, Commissioner	***)***	
of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This supplemental Security Income ("SSI") and Social Security Disability ("SSD") appeal raises several questions, one of which is dispositive. Because the administrative law judge's error occurred at Step 5 of the sequential evaluation process, I recommend that the court deny the commissioner's pending motion for remand and, instead, remand the case for payment of benefits.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on April 10, 1996, the date he stated he became unable to work, and remained insured at least through December 31, 2001, Finding 1, Record at 20; that he had

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 1, 2000 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

not engaged in substantial gainful activity since April 10, 1996, Finding 2, *id*.; that he suffered from gastroesophageal reflux disease, a severe impairment that did not meet or equal the criteria of any of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 ("the Listings"), Finding 3, *id*.; that his statements concerning his impairment and its impact on his ability to work were not entirely credible in light of his description of his activities and lifestyle, the degree of required medical treatment, the reports of the treating and examining physicians, his medical history, and findings made on examination, Finding 4, *id*. at 21; that he lacked the residual functional capacity to lift and carry more than ten pounds occasionally, sit, stand and walk more than six hours in an eight-hour day, bend, and work with the general public for extended periods of time, Finding 5, *id*.; that he was unable to perform his past relevant work as a flagger, pipefitter and ground crew worker, Finding 6, *id*.; that his capacity for the full range of work was diminished by his inability to work with the general public for extended periods of time, Finding 7, *id*.; that given his age (39), high school education, semi-skilled work experience, and exertional capacity for light work, application of 20 C.F.R. Part 404, Subpart P, Appendix 2, § 202.29 ("the Grid"), would direct a conclusion of "not disabled," Findings 8-11, *id*.; that although he was unable to perform the full range of work, he was capable of making the adjustment to work that exists in significant numbers in the national economy, including work as a code inspector, estimator and dispatcher, resulting in a finding of "not disabled" within the framework of the Grid,[2] Finding 12, *id*.; and that he had not been under a disability as defined in the Social Security Act at any time through the date of the decision, Finding 13, *id*. The Appeals Council declined to review the decision, *id*. at 6-7, making it the final decision of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

[2] The administrative law judge stated in this regard: "Although the claimant is unable to perform the full range of work, he is capable of making an adjustment to work which exists in significant numbers in the national economy. Such work includes employment as a code inspector, estimator, and dispatcher. A finding of 'not disabled' is, therefore, reached within the framework of the above-cited rule." (*continued on next page*)

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarrro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge in this case reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(f), 416,920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The commissioner moved for reversal and remand of this case on November 13, 2000, five months after the complaint was filed, because the administrative law judge listed in her opinion as specific jobs the plaintiff could perform jobs that were not identified at the hearing as ones that could be performed with the plaintiff's functional limitations. Defendant's Motion for Remand (Docket No. 4) at 1-2. The commissioner takes the position that further testimony by a medical advisor and the vocational expert who testified at the initial hearing is necessary. *Id*. at 2. The plaintiff objects to the motion and contends that the commissioner by his motion has "concede[d] that he has failed to meet his burden at Step 5 of the Sequential Evaluation Process," making remand for payment of benefits appropriate under *Field v. Chater*, 920 F. Supp. 240 (D. Me. 1995). Plaintiff's Objection to

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Record at 21.

Defendant's Motion for Remand, etc. (Docket No. 5) at 1. The commissioner's response is two-fold: he argues that *Field* has been effectively overruled by *Chester v. Callahan*, 193 F.3d 10 (1st Cir. 1999), and, even if that is not the case, is so inconsistent with *Rose v. Shalala*, 34 F.3d 13 (1st Cir. 1994), that it should be abandoned by this court; and, on the merits, he asserts that the vocational expert's testimony at the hearing that there were jobs not cited in the administrative law judge's decision that the plaintiff could perform given his functional limitations constitutes substantial evidence in support of her ultimate conclusion. Defendant's Response to Plaintiff's Objection to His Motion for Remand (Docket No. 6) at 1-5.

The commissioner's argument with respect to *Field* is unpersuasive. The question whether remand for payment of benefits or for further proceedings is appropriate when the commissioner has failed to carry his burden of proof at Step 5, which was addressed squarely in *Field*, was not addressed in *Rose v. Shalala*, in which the First Circuit remanded a Step 5 case for further proceedings without any indication that the claimant had requested any other relief. In *Chester v. Callahan*, remand was ordered due to a finding that the administrative law judge's conclusion at Step 4 of the sequential review process[3] was not supported by substantial evidence. 193 F.3d at 12. While the court went on to discuss the impact of the Step 4 finding on Step 5 of the process, it also discussed the lack of evidence on the question whether the claimant's condition was expected to persist for twelve continuous months, *id*. at 13, a question that arises at Step 3 of the process, 20 C.F.R. §§ 404.1520(d), 416.920(d). Nothing in *Chester* is necessarily inconsistent with this court's holding in *Field* and, again, the issue addressed in *Field* is not raised in the *Chester* opinion.

With respect to the commissioner's argument on the merits, there is no indication in the record that the administrative law judge, in finding that the plaintiff could perform specific jobs that the

[3] The determination whether the claimant can perform his past relevant work is made at Step 4 of the sequential review process. 20 (*continued on next page*)

vocational expert testified were inconsistent with the limitations which the administrative law judge also found to exist, Record at 18, 21, 53-54, merely made a typographical or recording error. The jobs at issue are not neatly packaged or categorized in the vocational expert's testimony, so that one "group" of jobs might easily and inadvertently be substituted for another. Record at 51-58. The administrative law judge's listing of jobs that are not compatible with a limitation she found applicable to the plaintiff — inability to work with the general public for extended periods of time — can only be interpreted as a deliberate, and erroneous, choice that is not supported by substantial evidence in the record. The commissioner nonetheless contends that, because the vocational expert testified that there were other jobs in the national economy that the plaintiff could perform despite this limitation, *id*. at 54-57, the administrative law judge's ultimate conclusion that the claimant was not under a disability is supported by substantial evidence in the record, and that is all that is required.

Counsel for the commissioner offered no authority to support his position. I asked counsel at oral argument to address the following requirement set forth in Social Security Ruling 96-9p with respect to sedentary work:

> Where there is more than a slight impact on the individual's ability to perform the full range of sedentary work, if the adjudicator finds that the individual is able to do other work, the adjudicator must cite examples of occupations or jobs the individual can do and provide a statement of the incidence of such work in the region where the individual resides or in several regions of the country.

Social Security Ruling 96-9p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2000) at 156. While the ruling is limited by its terms to a capacity for sedentary work, and the administrative law judge in this case found that the plaintiff had an exertional capacity for light work, Record at 21, the rationale of the Ruling appears to me to be equally applicable to a capacity for light work. Indeed, the administrative law judge's finding that the plaintiff "lacks the residual

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C.F.R. §§ 404.1520(e), 416.920(e); *Goodermote*, 690 F.2d at 7.

functional capacity to lift and carry more than ten pounds occasionally," *id*., is compatible with a capacity for sedentary rather than light work, 20 C.F.R. §§ 404.1567(a), 416.967(a).

My research has unearthed no authority to support the commissioner's argument that the presence in the record of evidence that might support his conclusion is sufficient to allow a court to affirm his decision in the face of specific findings by the administrative law judge that do not rely on that evidence and are themselves without substantial evidentiary support in the record. In light of this lack of authority and my repeated statement in many past Social Security cases to the effect that the commissioner is not entitled to multiple attempts to get things right at Step 5, I am not willing to reach the conclusion suggested by the commissioner. To do so would require courts in every case to comb the record for evidence not mentioned by the administrative law judge that might support the ultimate conclusion he or she reached whenever the reasons given by the administrative law judge for that conclusion cannot be supported by the evidence or reasons set forth in his or her opinion. In this case, the Appeals Council was given an opportunity to correct the specific error at issue, Record at 296-97, and refused to do so. The commissioner's belated recognition of the error does not entitle him to a third attempt. As counsel for the commissioner stated in the motion to remand, "[I]t cannot be determined from the record if the ALJ found some reason not to cite [the jobs that the vocational expert testified could be performed with the indicated limitation]." Defendant's Motion for Remand at 2. The burden was on the commissioner at Step 5 to see that such a reason was stated, if it existed at all. If such a reason had been given, however, there is no other evidence in the record to support the administrative law judge's conclusion that there is available work to which the plaintiff could make an adjustment. Under the circumstances, the commissioner must be bound by the actions and statements of the administrative law judge and the Appeals Council.

Conclusion

For the foregoing reasons, I recommend that the commissioner's motion to remand be **DENIED** and that the commissioner's decision be **VACATED** and the cause **REMANDED** with instructions to award the plaintiff benefits.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 4th day of December, 2000.

David M. Cohen
United States Magistrate Judge

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